

LIBRARY

U.S. SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

Office-Supreme Court, U.S.

F I L E D

OCT 16 1966

JOHN F. DAVIS, CLERK

No. 84

OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ARIZONA

REPLY BRIEF OF PETITIONER

DARRELL F. SMITH

THE ATTORNEY GENERAL OF ARIZONA

By: Dale R. Shumway
Capitol Building
Phoenix, Arizona

and

Special Counsel

John P. Frank
900 Title & Trust Building
Phoenix, Arizona

Paul G. Ulrich
900 Title & Trust Building
Phoenix, Arizona

Dix W. Price
610 Luhrs Tower
Phoenix, Arizona

INDEX
Subject Index

| REPLY BRIEF OF PETITIONER | Page |
|--|------|
| Argument | 1 |
| I. Introduction | 1 |
| II. The Position of the United States as to Determining the Standard of Value is Unsound | 2 |
| III. The Enabling Act Does Not Permit Offsets for Enhancement To Be Deducted from Amounts Paid as Compensation | 3 |
| IV. The Enabling Act Provisions Relating to Land Grants Are To Be Narrowly Construed | 5 |
| Conclusion | 8 |

TABLE OF CASES AND AUTHORITIES CITED

| Cases: | Page |
|---|---------|
| Aaronson v. United States, 79 F.2d 139 (D.C. Cir. 1935) | 3 |
| Baker v. Carr, 369 U.S. 186, 226 n. 53, 82 Sup. Ct. 691, 7 L.Ed. 2d 663 (1962) | 6 |
| Bauman v. Ross, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897) | 3 |
| Blair v. Chicago, 201 U.S. 400, 471, 26 Sup. Ct. 427, 50 L. Ed. 801 (1906) | 7 |
| Caldwell v. United States, 250 U.S. 14, 39 Sup. Ct. 397, 63 L.Ed. 816 (1919) | 7 |
| Coyle v. Smith, 221 U.S. 559, 31 Sup. Ct. 688, 55 L.Ed. 853 (1911) | 5, 6, 7 |
| Ex parte Webb, 225 U.S. 302, 32 Sup. Ct. 769, 56 L.Ed. 1099 (1912) | 6 |
| Northern Pac. R. Co. v. United States, 330 U.S. 248, 67 Sup. Ct. 747, 91 L.Ed. 876 (1947) | 7 |
| Slidell v. Grandjean, 111 U.S. 412, 4 Sup. Ct. 475, 28 L.Ed. 321 (1883) | 7 |
| State ex rel. State Highway Comm'n v. Walker, 61 N.M. 379, 301 P.2d 317 (1956) | 5 |
| Suffield v. State, 92 Ariz. 152, 375 P.2d 263 (1962) | 4 |
| Town of Williams v. Perrin, 70 Ariz. 157, 217 P.2d 918 (1950) | 4 |

Cases:

Page

United States v. Union Pac. R. Co., 353 U.S. 112, 77

Sup. Ct. 685, 1 L.Ed. 2d 693 (1957) 7

Statutes:

Federal

New Mexico-Arizona Enabling Act, 36 Stat. 557

(1910) 1, 3, 8

Act of Mar. 2, 1893, ch. 197, sec. 11, 27 Stat. 532 3

33 U.S.C. Sec. 595 (1964) 3

State:

Arizona Revised Statutes:

Sec. 12-1122(A) (3) 4

~~Sec. 37-102(A)~~ 6

Sec. 37-132 6

Sec. 37-461 6

Ariz. Const., Art. X

Sec. 1 1

Sec. 2 6

Other:

H.R. Rep. No. 350, sec. 7, 65th Cong., 2d Sess. (1918) 3

S.Rep. No. 433, sec. 7, 65th Cong., 2d Sess. (1918) 3

Annot., 145 A.L.R. 7 (1943) 3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 84

OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.
ARIZONA HIGHWAY DEPARTMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF ARIZONA

REPLY BRIEF OF PETITIONER

Argument

I. *Introduction.*

Certain lands were given to Arizona and New Mexico by the United States when those states were admitted to the union. The grant of these lands under the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557 (1910), which is for this purpose the same for the two states, provided that those lands should be held in trust, principally for schools, and that any disposition for any other purpose "shall be deemed a breach of trust." The act further provided that the lands could be disposed of only upon sale after appraisal and that there should be no disposition except after appraisal of true value. This trust was accepted by the state. Ariz. Const. art. X, sec. 1.

The Arizona Supreme Court has held that despite this trust, the lands can be taken by the State Highway Department for

public roads without any compensation at all and, as is fully developed in the earlier papers, a utility which is in fact handling the representation for the Highway Department is waiting in the wings to enjoy the same privileges.

There are now before the court the Brief of Petitioner, a Brief of the United States as Amicus Curiae, and the Brief of Respondent. We believe that the issues drawn in those briefs are sufficiently sharp so that only a brief response will be useful.

II. The Position of the United States as to Determining the Standard of Value is Unsound.

The United States agrees with Petitioner that the decision of the Supreme Court of Arizona should be reversed. It disagrees with Petitioner only insofar as Petitioner insists that the language of the act categorically requires that the lands must be appraised at their true value and that no disposition can be made "for a consideration less than the value so ascertained." The United States contends that adherence to the statute may end in "highly unrealistic results" because in some instances the building of the road may enhance the value of the lands. The government tells us that it can "see no objection in principle to the state's taking this factor into account." However, it acknowledges that this "represents a departure from standard eminent-domain principles." Brief of the United States, p. 19. The government agrees that even under its approach the burden would be on the Highway Department to prove actual enhancement.

Will all due respect for the government's position, we submit its argument is addressed to the wrong forum. In our view, the result of the statute and of the regulation of the Land Commissioner which carries it into effect is not "highly unrealistic." But that issue is not here. If Congress wishes to change the statute, it can do so. As the matter stands under this act and under this trust, it would be impossible with the full resources of the English language to draft a more specific statute than one which provides, as does this Enabling Act, that the lands "shall

be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained." (Quoted in Brief of Petitioner, p. 38).

III. *The Enabling Act Does Not Permit Offsets for Enhancement To Be Deducted from Amounts Paid as Compensation.*

As an original matter, if there were no statute, a court might or might not offset enhancement in value to the remainder of the tract from the amount of compensation to be paid for the portion taken. See *Aaronson v. United States*, 79 F.2d 139 (D.C. Cir. 1935); see generally 145 A.L.R. 7 (1943). Dissatisfaction with this flexibility in particular cases has led to the enactment of various statutes requiring that offsets be applied.¹

These statutes, however, deal with only narrowly defined categories of eminent domain proceedings. None cover the circumstances presented by this case. Where they do not apply, presumably the original pattern of permitting diverse approaches to the question of deducting offsets from the value of land taken would be permissible.

The New Mexico-Arizona Enabling Act approaches this question from a different direction. It too deals with the question of compensation for the taking of lands for certain public purposes, but takes the unequivocal position that these trust lands may only be disposed of after an appraisal of true value and payment of that price. This statute, it is submitted, by its unquestioned application to the present case completely disposes of the question whether offsetting benefits may be deducted from the value of lands taken. By providing a specific manner for the determination of value, no conflicting alternatives are permissible.

Respondent contends that the lands may be taken without compensation on the bland assumption that the roads will benefit

¹See, e.g., 33 U.S.C. Sec. 595 (1964); H.R. Rep. No. 350, sec. 7, 65th Cong., 2d Sess. (1918); S. Rep. No. 433, sec. 7, 65th Cong., 2d Sess. (1918); *Bauman v. Ross*, 167 U.S. 548, 17 Sup.Ct. 966, 42 L.Ed. 270 (1897) (discussing Act of Mar. 2, 1893, ch. 197, sec. 11, 27 Stat. 532).

the residue of the trust lands more than the loss of the land involved detracts. For the reasons already stated, we think that this is simply irrelevant. As a rule of law, this would not be accepted in Arizona as applied to any other lands than these trust lands. Arizona law permits only offsets to severance damages in eminent domain cases.² It is well settled in Arizona under A.R.S. Sec. 12-1122(A)(3) that the condemnor may deduct benefits only from damages to the remainder and not from compensation for the parcel actually taken. The Arizona Supreme Court in *Town of Williams v. Petrin*, 70 Ariz. 157, 217 P.2d 918 (1950), held that the lower court, in a condemnation action, did not "err in refusing to allow appellees' tenant to testify as to what benefit the water line would be to him," because:

"there was no evidence that the appellees would have the right to make use of the water therefrom. Moreover, since no evidence was introduced as to any damages which the pipeline had caused to the rest of the appellees' land, the issue of benefit to the remaining land was immaterial, since under A.R.S. 27-915(3) [now A.R.S. 12-1122] . . . *where only a part of the tract is taken for public use, the benefits accruing to the residue may be set off against the damages thereto and not as against the value of the part taken.*" 217 P.2d at 920. (Emphasis supplied.)

See also *Suffield v. State*, 92 Ariz. 152, 375 P.2d 263 (1962).

The net effect is that if this offset so casually assumed by petitioner were allowed, the trust lands would be subject to a direct discrimination and would be the only lands in the State of Arizona which the state could take on any such theory. But for

²A.R.S. Sec. 12-1122(A)(3) provides:

"A. The court or jury shall ascertain and assess: . . . 3. How much the portion not sought to be condemned and each estate or interest therein will be benefited separately, if at all, by construction of the improvement proposed by plaintiff. If the benefit is equal to the damages assessed under paragraph 2 of this subsection, the owner of the parcel shall be allowed no compensation except for the value of the portion taken, but if the benefit is less than the damages so assessed, the benefit shall be deducted from the damages, and the remainder shall be the only damages allowed in addition to the value."

the reasons already stated, in this case Congress has not only not granted this privilege but has done the categorical opposite, setting the appraised value as a minimum price to be paid for the lands taken.

IV. *The Enabling Act Provisions Relating to Land Grants Are To Be Narrowly Construed.*

One other argument offered by the respondent is that there is some special dispensation given to the states in interpreting their enabling acts which permits Arizona to disregard the language of this one.³ Thus, it is alleged by respondent that "if the State of Oklahoma may flatly overrule the Congressional mandate in its Enabling Act that the state capital remain at Guthrie until 1913" Arizona need not give strict interpretation to its enabling act in relation to the trust lands. Brief of Respondent, p. 22. The reliance for the Guthrie episode is based on *Coyle v. Smith*, 221 U.S. 559, 31 Sup.Ct. 688, 55 L.Ed. 853 (1911). The decision in this case and others following it are interpreted to suggest that there is an area "of which the state itself has either primary or exclusive responsibility." Hence, we are told that while Arizona could not "completely dispense with the value requirement of its enabling act" it can interpret its act so as to modify the value standard. Brief of Respondent, pp. 21-22.⁴ A corollary of this argument is that the State of Arizona, acting through its legislature and courts, is best able to determine how the value require-

³We do not respond to respondent's argument that there is some contrary precedent created by a motion of the Department of Justice in a case in the Federal District Court because, with all respect, we find nothing in it which relates to this problem. The motion, set forth by Respondent's pages 42-43 of their Brief, is clearly based on sovereign immunity which, as we see it, does not appear to bear on the problem here involved.

⁴It will be recalled that New Mexico has interpreted the same act in the exactly opposite way from Arizona, *State ex rel. State Highway Comm'n v. Walker*, 61 N.M. 379, 301 P.2d 317 (1956). Respondent contends that such acts "should not be narrowly construed" and that the two conflicting decisions may stand side by side.

ments of the act may be most effectively administered. Brief of Respondent, pp. 6, 23.⁵

Coyle v. Smith contains no such implication; it is simply an equal footing case. See *Baker v. Carr*, 369 U.S. 186, 226 n. 53, 82 Sup. Ct. 691, 7 L.Ed. 2d 663 (1962); *Ex parte Webb*, 225 U.S. 302, 32 Sup. Ct. 769, 56 L.Ed. 1099 (1912). To even more clearly illustrate the limits of the holding of *Coyle v. Smith*, the opinion in the case itself expressly distinguished the situation then before the Court from a case like the present one. It stated:

"It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or *regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress*. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was

⁵This corollary, however, in assuming that this division of responsibility has not yet been determined, neglects the actualities of Arizona law. Ariz. Const. art. X, sec. 2, quoted at page 40 of Petitioner's opening brief, deems a breach of trust disposition of the lands in any manner contrary to the provisions of the Enabling Act. A.R.S. Sec. 37-102 (A) establishes a state land department to administer all laws relating to lands owned by, belonging to, and under the control of the state. The state land commissioner is empowered by A.R.S. Sec. 37-132 to exercise and perform all powers and duties vested in or imposed upon the state land department, and to lease or sell all land owned or held in trust by the state. Specific authority is given the land department by A.R.S. Sec. 37-461 to make rules and regulations respecting the granting and maintenance of rights of way and material sites. A regulation promulgated under this authority is at the core of the present suit. There, thus can be no doubt that wherever the reservoir of state administrative power under the Enabling Act might have been vested as an original matter, existing Arizona law has vested it squarely in the State Land Department and Commissioner.

not plainly within the regulating power of Congress." (Emphasis added.) 31 Sup. Ct at 691.

In view of this carefully considered limiting of the holding in *Coyle v. Smith*, which expressly deals with the problem now before the Court, it is difficult to understand how the argument could be made that that holding extends to the present case.

The appropriate rule to be applied in construing the Enabling Act, rather, is that land grants made by governmental entities, including grants made to states, are to be narrowly construed.⁶ But even more persuasive than this rule of construction is the Enabling Act itself, which expressly says that the appraised value must be paid for the land that is disposed of.

⁶*Slidell v. Grandjean*, 111 U.S. 412, 4 Sup. Ct. 475 28 L.Ed. 321 (1883); *Blair v. Chicago*, 201 U.S. 400, 471, 26 Sup. Ct. 427, 50 L.Ed. 801 (1906); *Caldwell v. United States*, 250 U.S. 14, 39 Sup. Ct. 397, 63 L.Ed. 816 (1919); *Northern Pac. R. Co. v. United States*, 330 U.S. 248, 67 Sup. Ct. 747, 91 L.Ed. 876 (1947); *United States v. Union Pac. R. Co.*, 353 U.S. 112, 77 Sup. Ct. 685, 1 L.Ed. 2d 693 (1957).

Conclusion

The New Mexico-Arizona Enabling Act requires that the lands granted to the state be disposed of only upon receipt of the appraised value of the land so taken. The land was put in trust on this basis and Arizona accepted the trust. The decision of the supreme court of the state fails to honor that commitment. The regulation of the State Land Commissioner fully effectuates and implements the purposes of the trust. For these reasons, as well as the reasons discussed in Petitioner's opening brief, the decision of the court below should be reversed.

Respectfully submitted,

DARRELL F. SMITH
THE ATTORNEY GENERAL
OF ARIZONA

By Dale R. Shumway
Capitol Building
Phoenix, Arizona

and

Special Counsel
John P. Frank
900 Title & Trust Building
Phoenix, Arizona

Paul G. Ulrich
900 Title & Trust Building
Phoenix, Arizona

Dix W. Price
610 Luhrs Tower
Phoenix, Arizona

October, 1966